

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILMER B. GAY,
Plaintiff,

v.

CITY OF PHILADELPHIA, et al.
Defendants

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CIVIL ACTION

NO. 03-5358

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, S.J.

April 20, 2005

Plaintiff Wilmer Gay (“Gay”), a prisoner at the Pennsylvania Department of Corrections at the State Correctional Institution at Huntingdon, brought this action pro se in October, 2003. Gay alleges numerous defendants have conspired for more than thirty years to violate his constitutional rights. His allegations include false arrest, false imprisonment, and denial of access to the courts.¹

On March 15, 2005, this court denied Gay’s motion to retain his legal materials in his cell. Gay has now filed a Motion for Reconsideration to: (1) amend this court’s order of March 15, 2005, and allow him to retain all his legal materials in his cell, and (2) join Gregg Marsano, deputy attorney general, as a defendant in this matter.²

A motion for reconsideration will be granted only if: (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or

¹ The allegations in Gay’s Motion for Reconsideration involve the following defendants: Diana Baney, Jeffrey Beard, Dalinda Carrero-Papi, Donald Elliott, Francis Filipi, Michael Fisher, Susan Forney, Thomas James, Kenneth Kyler, Patrick McMonagle, Gordon Steele, Sarah Vandenbraak Hart, Paul Weaverling, and Edward Wilt. They will be collectively referred to as “Commonwealth Defendants” unless otherwise noted.

² Gay did not file not a separate motion for joinder; he attached a sheet to the Motion for Reconsideration entitled “Joinder of Person Needed for Just Adjudication.”

prevent manifest injustice. Wiggins v. Boston Scientific Corp., No. 97-7543, 1999 WL 200672, at *2 (E.D. Pa. Apr. 8, 1999). There has been no intervening change in controlling law; there is no new evidence that has become available; there is no necessity to correct a clear error of law, or any manifest injustice.

Gay, citing out-of-date 1999 Prison Regulation DC-803, IV.Q, claims he is allowed to keep 9.8 cubic feet of materials in his cell, the equivalent to one footlocker and six record boxes. The current 2004 regulation permits an inmate to keep “one footlocker and two record center boxes” of materials in his cell. DC-803, IV.R. The defendants were correct in making Gay remove materials from his cell in excess of this requirement. Gay is permitted to keep his excess materials in a prison storage or property room and to use the “box for box” policy to exchange the materials in his cell with his materials in the property room.³

Gay also claims the prison regulations used to deprive him of his legal materials (DC-803, IV.R and DC-803, VI.F.6.a)⁴ violate his due process rights because they do not provide procedural safeguards for evaluating whether the legal materials are necessary for a prisoner’s right of access to the courts. This court has previously examined this issue in Gay v. Shannon, No. 02-4693, and concluded these regulations reasonably limit the time, place, and manner in which inmates engage in legal research and preparation. See Gittlemacker v. Prasse, 428 F.2d 1, 7 (3d Cir. 1970).

Gay also requests the court join Deputy Attorney General, Gregg Marsano (“Marsano”), representing the Commonwealth Defendants, as a defendant in this matter because of his “conspiratorial and criminal actions” in violation of Gay’s privileges and

³ The box-for-box policy was cited in Gay v. Shannon as DOC Policy 6.3.1.

⁴ In the 2004 regulation, these sections are DC-803, IV.S and DC-803, IV.6.a, respectively.

immunities. Gay's only basis for joining Marsano is that he filed the "Commonwealth Defendants' Response to Plaintiff's Motion for Order Granting Plaintiff the Right to Retain All of his Legal Property" in his official capacity as deputy attorney general. Gay alleges this court filing conceals the thirty-year conspiracy against him and Marsano's characterization of him as "litigious" was prejudicial.

Rule 20(a) permits joinder of defendants in a single action "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Fed.R.Civ.P. 20(a). A court should generally apply a liberal approach to permissive joinder. See United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966). However, because the purpose of this rule is to promote trial convenience and expedite the final determination of disputes, the district court has discretion to deny joinder pursuant to Rule 20 if it would result in prejudice, expense, or delay. See Swan v. Ray, 293 F.3d 1252, 1253 (11th Cir. 2002) (upholding denial of inmate's joinder motion because "it would add nothing to judicial efficiency"); see also 7 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1652 (3d ed. 2005).

Gay's request to join Marsano as a defendant will be denied for two reasons. First, it is impracticable to join Marsano at this stage in the action. Gay has filed two amended complaints since 2003 and he had substantial opportunities to name Marsano as a defendant. Joining Marsano now would significantly delay this matter because it would disqualify Marsano from representing the Commonwealth Defendants.

Second, Gay's claims against Marsano are frivolous because they are based on a response to one of Gay's motions that Marsano filed in his official capacity as deputy attorney general.⁵ Gay's Motion for Reconsideration provides no basis to believe that the response conceals the alleged conspiracy against him or prejudices him. The court has discretion to deny frivolous joinder claims.

Conclusion

Plaintiff's Motion for Reconsideration and Request to Join Gregg Marsano as a defendant will be denied. An appropriate order follows.

⁵ Because Marsano was acting in his official capacity as deputy attorney general it would qualify him for either qualified immunity or absolute immunity, depending on the nature of the allegations against him. See Imbler v. Pachtman, 424 U.S. 409, 428 (1976); Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988).

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ORDER

AND NOW, this 20th day of April, 2005, upon consideration of plaintiff's Motion for Reconsideration (paper # 88), and defendants' response thereto (paper # 91), for the reasons stated in the foregoing Memorandum, it is **ORDERED** plaintiff's Motion for Reconsideration and Request to Join Gregg Marsano as a defendant (paper # 88) is **DENIED**.

/s/ Norma Shapiro

NORMA L. SHAPIRO, S.J.